

IOWA DEPARTMENT OF NATURAL RESOURCES ADMINISTRATIVE ORDER

IN THE MATTER OF:

JOSH OTKEN;

Worth County, Iowa

ADMINISTRATIVE ORDER

NO. 2012-AQ-02

NO. 2012-SW-05

TO: Josh Otken
422 4th Avenue NE
Mason City, IA 50401

I. SUMMARY

This administrative order is issued by the Iowa Department of Natural Resources (DNR) to Josh Otken for the purpose of resolving violations related to the illegal disposal of solid waste, including illegal open burning, in August of 2011 in Worth County, Iowa.

Questions regarding this administrative consent order should be directed to:

Relating to technical requirements:

David Miller, Field Office 2
Iowa Department of Natural Resources
2300 15th St. SW
Mason City IA 50401
Phone: 641-424-4073

Payment of penalty to:

Director of the Iowa DNR
Wallace State Office Building
502 East Ninth Street
Des Moines, Iowa 50319-0034

Relating to legal requirements:

Jon Tack, Attorney for the DNR
Iowa Department of Natural Resources
502 E 9th St.
Des Moines, IA 50319
Phone: 515-281-8889

Filing of appeal:

Director of the Iowa DNR
Wallace State Office Building
502 East Ninth Street
Des Moines, Iowa 50319-0034

II. JURISDICTION

This administrative order is issued pursuant to the provisions of Iowa Code sections 455B.134(9) and 455B.138(1) which authorize the Director to issue any order necessary to secure compliance with or prevent a violation of Iowa Code chapter 455B, Division II (air quality), and the rules promulgated or permits issued pursuant to that part; Iowa Code section 455B.307(2) which authorizes the Director to issue any order necessary to secure compliance with or prevent a violation of Iowa Code chapter 455B, Division IV, Part 1 (solid waste), and the rules adopted pursuant to that part; and Iowa Code section 455B.109 and 567 Iowa

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Administrative Code (IAC) chapter 10, which authorize the Director to assess administrative penalties.

III. STATEMENT OF FACTS

1. At approximately 11:30 a.m. on August 9, 2011, the Worth County Sheriff's Office received a call from Clayton Rye indicating that there would be some controlled burning taking place at 3771 Eagle Avenue, Hanlontown on that date and several days to follow. At approximately noon on August 9, 2011, the DNR received a complaint from Dan Frank of Hanlontown who stated that someone was burning tires northwest of town.
2. At 12:55 p.m. on August 9, 2011, Environmental Specialist David Miller of DNR Field Office #2 arrived at the property located at 3771 Eagle Avenue, Hanlontown, Iowa. Mr. Miller observed a large plume of high-opacity black smoke emanating from the property and determined it was coming from a burning outbuilding with a footprint of approximately 15' by 25'. At that time, a number of items were observable within the building, including waste tires. The roof had already burned at this point. Other structures at the property consisted of one additional outbuilding, a derelict farm house, an aluminum mobile home and a small barn. The property was strewn with waste tires, boats, appliances, motorcycles, garbage, bicycles, plastic, Styrofoam, scrap metal, derelict cars and trucks, and other solid wastes.
3. At the time of inspection, there were several people present on the property. Josh Otken indicated to Mr. Miller that he had a business arrangement with Clayton Rye, the property owner, for Mr. Otken to clean up the property. Mr. Otken indicated that he was supervising the other people present and that they were his employees. At that point, Mr. Miller advised Mr. Otken that it was illegal to burn waste tires and that other regulations applied to the burning of agricultural structures, such as the removal of asphalt shingles.
4. Mr. Otken informed Mr. Miller that he intended to burn the second outbuilding and the house but would not be burning the barn or mobile home. At that point, Mr. Miller discussed all burning and waste tire disposal regulations with Mr. Otken and informed Mr. Otken that the numerous waste tires on the property could be taken to the local landfill. Because there were numerous discarded appliances on the property, Mr. Otken was informed of the regulations related to the proper handling and disposal of discarded appliances.
5. On this date, Mr. Miller also inspected the west outbuilding with Mr. Otken and identified all steps that must be taken prior to burning including the removal of the shingles and the removal of the contents of the building which included a yard tractor, several waste tires, paint, lawn and garden chemicals, and other household hazardous materials. Mr. Otken was also informed that the house could not be burned until the shingles had been removed. Mr. Otken was instructed to notify the Hanlontown Fire Chief and the Worth County Sheriff prior to burning any additional structures.

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6. Finally, Mr. Miller advised Mr. Otken that he would be receiving a Notice of Violation due to the illegal burning of waste tires and other materials remaining in the building which had been burned on that date. Mr. Otken assured Mr. Miller that he would follow all regulations in the future. Mr. Miller also warned Mr. Otken that further violations would result in an enforcement action and the assessment of penalties. Copies of the applicable rules were left with Mr. Otken.

7. On or about August 10, 2011, the remaining outbuilding, the house, and the mobile home at the subject property were burned. Local residents reported viewing a very large plume of black smoke for several hours.

8. On August 17, 2011, Mr. Miller returned to the property. Mr. Miller determined that the outbuilding had been burned without removing any of the solid or hazardous waste or other prohibited materials. The mobile home had been burned with an air conditioner and other appliances contained therein. Four waste tires were also burned on the mobile home. Based upon the lack of any significant asphalt shingle pile on the site and the timing of the fire, Mr. Miller determined that the house had been burned with the asphalt shingles remaining on the roof. Included in or in addition to the structures that had been burned, the following materials were burned at the site on August 10th: more than 30 waste tires, 5 air conditioners, 2 gas water heaters, a gas furnace, a large pile of household hazardous materials, and a boat on a trailer.

9. On August 17th, Mr. Miller met with the property owner, Clayton Rye. Mr. Rye indicated that he had located Mr. Otken on Craigslist and hired him for the cleanup of his property. Mr. Otken was to be paid \$15,500. Mr. Rye was notified of the violations that had occurred on his property.

10. Also on August 17th, Mr. Miller contacted Pete Bratrud, Hanlontown Fire Chief. Mr. Bratrud stated that the Fire Department was not notified prior to the fires at the property.

11. At approximately 3:30 p.m. on August 17th, Mr. Miller contacted Josh Otken by telephone. Mr. Otken asserted that the buildings had been burned without his knowledge when he was away from the job site; however, he asserted that all shingles had been removed. Mr. Otken also alleged that the burning of the mobile home was unintentional.

12. On August 18, 2011, Mr. Miller was contacted by Eric Sauers of 907 North Jefferson, Mason City. Mr. Sauers identified himself as an employee of Josh Otken during the cleanup of the Clayton Rye property. Mr. Sauers stated that he was present when the buildings were burned and that no shingle removal had occurred prior to the fires. Mr. Sauers further indicated that packages of shingles were found at the site so they were opened and scattered to provide an appearance of shingle removal. Mr. Sauers also stated that Mr. Otken informed all employees that they were to inform the DNR, if asked, that all shingles had been removed from the buildings.

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IV. CONCLUSIONS OF LAW

1. Iowa Code section 455B.133 provides that the Environmental Protection Commission (Commission) shall establish rules governing the quality of air and emission standards. The Commission has adopted 567 IAC chapters 20-35 relating to air quality.
2. 567 IAC 23.2 states that no person shall allow, cause, or permit open burning of combustible materials except as provided in subrules 567 IAC 23.2(2) (variances) and 567 IAC 23.2(3) (exemptions). The burning documented in this matter does not fall under any of the exemptions in 567 IAC 23.2(3) and is therefore prohibited. The burning of waste tires is specifically prohibited. In addition to other regulatory requirements, all asphalt roofing and chemicals must be removed from an agricultural structure before burning. The above facts demonstrate a violation of this provision.
3. Iowa Code section 455B.307 and 567 IAC 100.4 prohibit a private or public agency from dumping or depositing or allowing the dumping or depositing of any solid waste at any place other than a sanitary disposal project approved by the Director.

V. ORDER

THEREFORE, the DNR hereby orders Josh Otken to pay a penalty in the amount of \$8,495 within 30 days of the execution of this administrative order.

VI. PENALTY

1. Iowa Code section 455B.146 authorizes the assessment of civil penalties of up to \$10,000 per day of violation for each of the air quality violations involved in this matter. More serious criminal sanctions are also available pursuant to Iowa Code section 455B.146A. Iowa Code section 455B.307(3) authorizes the assessment of civil penalties of up to \$5,000 per day of violation for the solid waste disposal violations involved in this matter.
2. Iowa Code section 455B.109 authorizes the Commission to establish by rule a schedule of civil penalties up to \$10,000, which may be assessed administratively. The Commission has adopted this schedule with procedures and criteria for assessment of penalties in 567 IAC chapter 10. Pursuant to these rules, the DNR has determined that the most effective and efficient means of addressing the above-cited violations is the issuance of an order with an administrative penalty of \$8,495. The administrative penalty is determined as follows:

Economic Benefit – Josh Otken has achieved an economic benefit from the violations documented herein. The property owner, Clayton Rye, stated that he was paying Josh Otken

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\$15,500 for the cleanup of the property. The DNR calculates the following cost savings achieved by Josh Otken through his illegal conduct:

- Avoidance of the cost of disposal of at least 30 waste tires. The Central Disposal Landfill at Lake Mills charges \$10 per tire. The DNR estimates costs related to loading and hauling the tires to be \$150 for a total of \$450.
- Avoidance of costs related to the removal of asphalt shingles. DNR estimates that shingle removal would have taken 2 men at least ½ day or 8 total man hours. At a rate of \$15/hour plus hauling and disposal costs, the DNR estimates a total of \$270.
- Avoidance of costs related to paint and household hazardous waste disposal. These materials can be disposed of at no charge but the DNR estimates the labor costs related to loading and transporting these materials to be 5 hours or \$75.
- Avoidance of costs for disposal of the mobile home, boat, trailer and other solid waste burned. Tonnage fees at the local landfill are \$65 per ton. The DNR estimates the cost of hauling and disposal of these materials to be \$400.
- Avoidance of costs related to appliance disposal. Eight appliances were burned in the fires. The local landfill charges \$25 per appliance or \$200. Cost related to loading and hauling these appliances is estimated to be \$100.

Based upon these facts, the DNR assesses \$1,495 for this factor.

Gravity – One of the factors to be considered in determining the gravity of a violation is the amount of penalty authorized by the Iowa Code for the type of violation. As indicated above, civil penalties are authorized by statute. In this case substantial civil penalties are justified due to the hazardous constituents that were burned. The illegal open burning of waste tires, asphalt shingles, and household hazardous wastes all release toxins that endanger human health and the environment. The open burning of discarded appliances can result in the release of toxic refrigerants, mercury and PCBs into the environment. These fires presented a significant risk to human health and the environment and are likely to have caused exceedences of ambient air quality standards. There were multiple days of violation. In order to resolve this matter administratively, \$3,000 is assessed for this factor.

Culpability – Josh Otken held himself out to be in the business of property cleanup. An individual engaged in this business has a heightened duty to be aware of the applicable disposal regulations and prohibitions. Mr. Otken intentionally violated the open burning prohibitions after being informed of those prohibitions and provided with a copy of the applicable regulations. The burning occurred on multiple dates, before and after such notification. In order to resolve this matter administratively, \$3,000 is assessed for this factor.

Aggravating Factors – Josh Otken provided false information to the DNR and instructed his employees to provide false information to the DNR to cover up his illegal activity. For these reasons, an additional \$1,000 is assessed.

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VII. APPEAL RIGHTS

Pursuant to Iowa Code sections 455B.138 and 455B.308 and 561 IAC 7.4(1), as adopted by reference at 567 IAC 7.1, a written Notice of Appeal to the Commission may be filed within 30 days of issuance of this administrative order. The Notice of Appeal should be filed with the Director of the DNR, and must identify the specific portion or portions of this order being appealed and include a short and plain statement of the reasons for appeal.

VIII. NONCOMPLIANCE

Failure to comply with this administrative order, including failure to timely pay any penalty, may result in the imposition of further administrative penalties or referral to the attorney general to obtain injunctive relief and civil penalties pursuant to Iowa Code sections 455B.146 and 455B.307. Total compliance with all provisions of Section "V. Order" of this administrative order constitutes full satisfaction of all requirements pertaining to the specific violations described in Section "IV. Conclusions of Law" of this administrative order.



ROGER L. LANDE, DIRECTOR
Iowa Department of Natural Resources

Dated this 9th day of
January, 2012.

Field Office #2; VI C; VII C(4)